

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Margaret J. Tilley,

Complainant,

vs.

James Swift,

Respondent.

FINDINGS OF FACT,  
CONCLUSIONS  
AND ORDER

The above-entitled matter came on for an evidentiary hearing on October 18, 2004, before a panel of three Administrative Law Judges: Beverly Jones Heydinger (presiding judge), George A. Beck, and Steve M. Mihalchick. Pursuant to an agreement of the parties, the panel made its determination based on the record created at the October 7, 2004, probable cause hearing and documents filed by the parties by October 18, 2004. No separate evidentiary hearing was held. The hearing record closed on October 18, 2004.

Alan Weinblatt, Weinblatt & Gaylord, PLC, Suite 300 Kellogg Square, 111 East Kellogg Boulevard, St. Paul, MN 55101, represented Ms. Tilley ("Complainant") and participated in the probable cause hearing by telephone. James Swift ("Respondent") participated in the probable cause hearing by telephone without counsel.

During the telephone conference, the Complainant and Respondent gave sworn testimony, and the record was supplemented with one exhibit, Exhibit 1. In addition, both parties submitted additional written material for consideration by the panel.

**NOTICE**

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

**STATEMENT OF THE ISSUES**

1. Is Mr. Swift's written response to the *Pioneer Press* questionnaire "campaign material" within the meaning of Minn. Stat. § 211B.01, subd. 2?

2. Did Ms. Tilley establish, by clear and convincing evidence, that Mr. Swift violated Minn. Stat. § 211B.06, subd. 1, by intentionally preparing and disseminating campaign material regarding Ms. Tilley that was false, and that Mr. Swift knew was false or that was communicated to others with reckless disregard for whether it was false?

3. What remedy, if any, is appropriate?

Based upon the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

## FINDINGS OF FACT

1. Margaret J. Tilley is an incumbent who is seeking re-election as a member of the Eagan City Council. James Swift is challenging Ms. Tilley for her seat on the Council in the upcoming November 2<sup>nd</sup> election.<sup>1</sup>

2. In addition to her position as an Eagan City Council Member, Ms. Tilley is the Chair of the Minnesota Valley Transit Authority (MVTA) Board.<sup>2</sup>

3. In 2003, the MVTA was looking for property on which to build a bus garage. The MVTA eventually decided to build the garage on a parcel of property owned by the Metropolitan Council. A parcel of land owned by Eagan resident Ms. Betty Adelman adjoined that property. Ms. Adelman is approximately 67-years-old, and maintains her home and a vegetable stand on that property. The MVTA then attempted to purchase Ms. Adelman's property, to add it to the Metropolitan Council property in order to have more room for the buses to maneuver in and out of the garage. The MVTA arranged for two appraisals of Ms. Adelman's property to be made, and subsequently offered her a sum of money for the purchase of her property. Ms. Adelman turned down the MVTA's offer as inadequate. Thereafter, the Metropolitan Council began the process of condemning Ms. Adelman's property by exercising its power of eminent domain.<sup>3</sup> But after public criticism, the Metropolitan Council discontinued pursuing eminent domain proceedings.<sup>4</sup>

4. In November 2003, a local newspaper reporter interviewed Ms. Tilley with respect to the attempt to acquire Ms. Adelman's property. Ms. Tilley stated that the MVTA's partnership with the Met Council was a mutual effort operated in good faith to provide public transit service and was not intended to harm anyone. Ms. Tilley further stated that she believed the bus garage project was a "wonderful and rare opportunity to partner with other governmental agencies to put otherwise unusable land to good use for a much-needed facility."<sup>5</sup>

5. Sometime in September of 2004, the *Pioneer Press* mailed questionnaires to political candidates, including Ms. Tilley and Mr. Swift.<sup>6</sup>

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<sup>1</sup> Testimony of Tilley and Swift.

<sup>2</sup> Testimony of Tilley; Ex. 1.

<sup>3</sup> The MVTA does not have the power of eminent domain. (Tilley's sworn statement in complaint.)

<sup>4</sup> Testimony of Tilley; Ex. 1.

<sup>5</sup> Testimony of Swift and Tilley.

<sup>6</sup> Testimony of Tilley and Swift.

6. Before drafting his response to the questionnaire, Mr. Swift conferred with Robin Selvig of the MVTA, and Ms. Betty Adelman.<sup>7</sup>

7. Mr. Swift submitted to the *Pioneer Press* a typewritten response to the questionnaire, which he completed himself. Mr. Swift's purpose in answering the questionnaire was to cast himself in a favorable light with voters and Ms. Tilley in an unfavorable light, in order to do well in the upcoming election. Mr. Swift kept a copy of his written response for his own records.<sup>8</sup>

8. On or about September 29, 2004, Laura Yuen, a reporter with the *Pioneer Press*, contacted Ms. Tilley by telephone. Ms. Yuen told Ms. Tilley that she had received Mr. Swift's response to the questionnaire and that he had identified two matters that he opposed and that he claimed Ms. Tilley had supported. According to Ms. Tilley's notes of her conversation with Ms. Yuen, Mr. Swift wrote in his questionnaire response that Ms. Tilley "supported: (1) proclaiming June to be GLBT<sup>9</sup> month in Eagan; and (2) attempting to condemn the land of Ms. Adelman, a 67-year-old grandmother on dialysis, to build a garage for the MVTA." Ms. Tilley attempted to write down, as best she could, "word for word", what Ms. Yuen read to her over the telephone.<sup>10</sup>

9. An article written by Ms. Yuen appeared in the *Pioneer Press'* Dakota County edition on Friday, October 1, 2004. In the article, Mr. Swift is quoted as criticizing the Eagan City Council for declaring June to be Gay, Lesbian, Bisexual, Transgender Pride Celebration month. In addition, the article states:

Swift is also challenging Tilley's role as chairwoman of the Minnesota Valley Transit Authority. Last year, the Metropolitan Council was on the cusp of condemning an Eagan woman's home and vegetable stand to make room for an MVTA bus garage. After a public outcry, the Met Council called off the eminent-domain proceedings.<sup>11</sup>

10. On October 4, 2004, Ms. Tilley filed a Complaint with the Office of Administrative Hearings alleging that Mr. Swift violated Minn. Stat. § 211B.06 by making false statements about her conduct and personal and political character with the intent to defeat her candidacy. Specifically, Ms. Tilley alleged that Mr. Swift falsely stated that she proclaimed June 2004 to be Gay, Lesbian, Bisexual, Transgender (GLBT) month, and that she attempted to condemn the land of Ms. Adelman.

11. On October 7, 2004, Administrative Law Judge Bruce Johnson held a probable cause hearing on the allegations contained in Ms. Tilley's complaint. Both parties participated by telephone<sup>12</sup> and the hearing was tape-recorded. During the

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<sup>7</sup> Testimony of Swift.

<sup>8</sup> Testimony of Swift.

<sup>9</sup> Gay, Lesbian, Bisexual and Transgender.

<sup>10</sup> Testimony of Tilley.

<sup>11</sup> Ex. 1.

<sup>12</sup> See, Minn. Stat. § 211B.36, subd. 4, allowing hearings to be conducted by conference telephone call.

hearing, both parties agreed that, if probable cause were found, a three-judge panel could issue a dispositive decision based on the record created at the probable cause hearing and that no evidentiary hearing would be necessary.

12. By Order dated October 12, 2004, Judge Johnson found probable cause to believe that Mr. Swift violated Minn. Stat. § 211B.06 by stating in his written questionnaire response submitted to the *Pioneer Press* that Ms. Tilley supported an attempt by the Metropolitan Council to condemn the land of a 67-year-old Eagan resident.

13. Judge Johnson, however, found no probable cause to believe that Mr. Swift violated Minn. Stat. § 211B.06 by stating in his written questionnaire response that Ms. Tilley supported a resolution proclaiming June 2004 to be “Gay, Lesbian, Bisexual, Transgender Pride Celebration Month.” Noting that Ms. Tilley had, along with three other Eagan City Council members, voted for the resolution proclaiming June to be GLBT Pride Celebration Month, Judge Johnson found that it was reasonable to conclude that Ms. Tilley had supported the resolution.

14. On October 12, 2004, the remaining allegation in the complaint was submitted to the undersigned panel of three Administrative Law Judges.

15. On October 18, 2004, the panel met and considered the record, including the tape recording of the probable cause hearing and all correspondence submitted by the parties.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Administrative Law Judges are authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. Minn. Stat. § 211B.01, subd. 2, as amended in 2004, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by news media.”<sup>13</sup>

3. Mr. Swift’s written response to the *Pioneer Press* questionnaire is material disseminated for the purpose of influencing voting in the general election and is, therefore, “campaign material” under Minn. Stat. § 211B.01, subd. 2.

4. Minn. Stat. § 211B.06, subdivision 1, provides, in part, as follows:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or

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<sup>13</sup> Minn. Stat. § 211B.01, subd. 2; Minn. Laws 2004 ch. 293, art. 3 § 1.

campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

5. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of section 211B.06, relating to false statements in campaign material, is clear and convincing evidence.<sup>14</sup>

6. Ms. Tilley has failed to establish, by clear and convincing evidence, that Mr. Swift violated Minn. Stat. § 211B.06. Specifically, Ms. Tilley has failed to establish by clear and convincing evidence that Mr. Swift's response to the *Pioneer Press* questionnaire contained a false statement that Mr. Swift knew was false or was communicated to others with reckless disregard of whether it was false.

Based on the Findings of Fact and Conclusions of Law, and for the reasons set forth in the Memorandum, attached hereto and incorporated herein:

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The Complaint is DISMISSED.
2. No costs or fees be assessed against the Complainant.

Dated: October 21, 2004

S/ Beverly Jones Heydinger  
BEVERLY JONES HEYDINGER  
Administrative Law Judge

S/ George A. Beck  
GEORGE A. BECK  
Administrative Law Judge

S/ Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

### **MEMORANDUM**

Ms. Tilley alleges that Mr. Swift violated Minn. Stat. § 211B.06, subd. 1, by submitting a written candidate questionnaire to the *Pioneer Press* newspaper that contained false statements about her support of the Metropolitan Council's attempt to

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<sup>14</sup> Minn. Stat. § 211B.32, subd. 4.

condemn the property of a 67-year-old Eagan resident named Betty Adelman. Minn. Stat. § 211B.06, subd. 1, prohibits the intentional preparation or dissemination of false campaign material, that the person doing the preparation or dissemination knows is false or communicates to others with reckless disregard of whether it is false.

Campaign material is defined to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”<sup>15</sup> Mr. Swift’s written response to the *Pioneer Press* questionnaire meets the definition of “campaign material.” His response falls within the broad category of “material” and Mr. Swift admitted in his testimony that his purpose in drafting and submitting his questionnaire response to the *Pioneer Press* was to cast himself in a favorable light with voters and Ms. Tilley in an unfavorable light, in order to do well in the upcoming election. In addition, the panel concludes that by submitting his candidate questionnaire response to the *Pioneer Press*, Mr. Swift “disseminated” the material, within the meaning of the statute.

Ms. Tilley claims that Mr. Swift falsely stated that, as chairwoman of the Minnesota Valley Transit Authority (MVTA), Ms. Tilley supported an attempt by the Metropolitan Council to condemn a parcel of real property on which was located the home and vegetable stand of Betty Adelman, a 67-year-old Eagan resident.<sup>16</sup> Ms. Tilley maintains that she “had no role” in the condemnation proceedings and that she did not know “in advance” that the Metropolitan Council was going to condemn Ms. Adelman’s property.<sup>17</sup> However, Ms. Tilley, as Chair of the MVTA, was involved in attempting to purchase Ms. Adelman’s property to add to the Met Council property on which the MVTA hoped to build a bus garage. Ms. Tilley described MVTA’s relationship with the Met Council to be a “partnership” based on a mutual good faith effort to provide public transit service.

The panel concludes that Ms. Tilley has failed to establish by clear and convincing evidence that Mr. Swift’s written response to the *Pioneer Press* questionnaire violated Minn. Stat. § 211B.06, subd. 1. Ms. Tilley’s hearing testimony regarding her conversation with the *Pioneer Press* reporter is the only evidence in the record establishing what Mr. Swift wrote in his questionnaire response. Mr. Swift refused to voluntarily submit a copy of that response, although he admitted that he retained a copy for his records. The reporter was not called to testify as to her conversation with Ms. Tilley. Given Ms. Tilley’s involvement in the MVTA’s attempt to acquire Ms. Adelman’s property, her testimony of what she was told was in the questionnaire by a third party, without more, does not satisfy the higher standard of proof, namely, clear and convincing evidence. The hearsay testimony mitigates against giving it great weight.

Even accepting Ms. Tilley’s testimony to be an accurate reflection of what Mr. Swift wrote and submitted to the newspaper, Ms. Tilley has failed to show that Mr. Swift knew his statement to be false or that he communicated it to others with reckless

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<sup>15</sup> Minn. Stat. § 211B.01, subd. 2.

<sup>16</sup> Complaint and Exhibit 1.

<sup>17</sup> Testimony of Tilley.

disregard of whether it was false. Mr. Swift knew that Ms. Tilley is the Chair of the MVTA and the MVTA was working in partnership with the Metropolitan Council to build a much-needed bus garage. In addition, he knew that Ms. Tilley thought that it would have been nice for the MVTA to acquire Ms. Adelman's adjoining property in order to have more room for the buses to maneuver in and out of the garage.

Given Mr. Swift's knowledge of these facts, it is not clear that Mr. Swift's statement to the Pioneer Press was knowingly false or communicated in reckless disregard of its truth or falsity.

**B.J.H., G.A.B., S.M.M.**